No. 06-1285

In the Supreme Court of the United States

CHRISTOPHER MENSAH DEKOLADENU, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is reported at 459 F.3d 500. The opinions of the Board of Immigration Appeals (Pet. App. 21a-23a, 24a-26a) and the decisions of the immigration judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2006. A petition for rehearing was denied on November 8, 2006 (Pet. App. 1a-2a). On February 5, 2007, The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 8, 2007. On February 28, 2007, The Chief Justice further extended the time to March 22, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that, as an alternative to formal removal proceedings and entry of a formal removal order, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1). Voluntary departure may be granted before the initiation of removal proceedings or during the course of such proceedings, 8 U.S.C. 1229c(a)(1), and also may be granted at the close of removal proceedings in lieu of ordering that the alien be removed, 8 U.S.C. 1229c(b)(1). Aliens who receive voluntary departure avoid the five to ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)). To qualify for a grant of voluntary departure at the close of removal proceedings, an alien must satisfy certain statutory conditions, including establishing that he "has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D); see 8 U.S.C. 1229c(b)(1)(A)-(C).

Because the Act provides that the Attorney General "may" permit an alien to depart voluntarily, the determination whether to allow an alien to do so is discretionary with the Attorney General, and with the immigration judge (IJ) and Board of Immigration Appeals (BIA) who act on his behalf. And the Act further provides that

"[t]he Attorney General may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens." 8 U.S.C. 1229c(e).

The Act prescribes that, when an alien is granted voluntary departure at the close of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). When voluntary departure is granted before the initiation or in the course of removal proceedings, rather than at the close of such proceedings, the alien may be allowed a maximum of 120 days to depart voluntarily. 8 U.S.C. 1229c(a)(2)(A).

An IJ who grants voluntary departure must "also enter an alternate order [of] removal," which takes effect if the alien fails to depart within the period specified in the voluntary departure order. 8 C.F.R. 1240.26(d); see 8 C.F.R. 1241.1(f). After entry of a final order, authority to extend a period of voluntary departure specified initially by an IJ or the BIA is vested in the district director or other officers of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security, see 8 C.F.R. 1240.26(f), subject to the statutory maximum of 120 days in the case of voluntary departure granted prior to or during removal proceedings. Failure "to depart the United States within the time period specified" results, *inter alia*, in the alien's becoming "ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (as amended by Act of Jan. 5, 2006, Pub. L. No. 109-162, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

b. The INA provides that an alien who has been found removable from the United States "may file one

motion to reopen [the removal] proceedings" to present "new facts." 8 U.S.C. 1229a(c)(6)(A) and (B). The statute prescribes that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(6)(C)(i). An alien who is the subject of removal proceedings and who departs the United States may not file a motion to reopen "subsequent to his or her departure." 8 C.F.R. 1003.2(d). In addition, if an alien who is the subject of removal proceedings departs the United States "after the filing of a motion to reopen," the alien's departure "constitute[s] a withdrawal of such motion." *Ibid.*

The regulations provide that, if removal proceedings are reopened, the IJ or the BIA may reinstate voluntary departure, but only "if reopening was granted prior to the expiration of the original period of voluntary departure." 8 C.F.R. 1240.26(f) and (h). Moreover, the "decision to grant or deny a motion to reopen * * * is within the discretion of the Board," and "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a). Finally, the filing of a motion to reopen "shall not stay the execution of any decision made in the case," and "[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by" the BIA or the IJ. 8 C.F.R. 1003.2(f).

2. Petitioner is a native and citizen of Ghana who was admitted to the United States in 1998 as a non-immigrant visitor for pleasure with authorization to remain for a period not exceeding six months. Petitioner remained within the United States beyond the authorized period. Pet. App. 4a.

In August 2000, the former Immigration and Naturalization Service commenced removal proceedings

against petitioner. Pet. App. 4a-5a; Administrative Record 179 (A.R.). Petitioner conceded that he was removable. On March 6, 2003, the IJ granted petitioner's request for voluntary departure in lieu of removal, and the IJ established a voluntary departure date of July 7, 2003. Pet. App. 5a, 25a; A.R. 36-37. The IJ's order included an alternate order of removal and specified that, if petitioner failed "to depart as required," the grant of voluntary departure would "be withdrawn without further notice or proceedings," and the alternate removal order would "become immediately effective." A.R. 36. The IJ's order also gave notice that, if petitioner failed to depart as required, he would be ineligible for certain forms of relief, including adjustment of status, for a period of ten years. A.R. 37.

3. Petitioner did not depart the United States within the 120-day period specified in the IJ's voluntary departure order. Instead, on July 7, 2003, the last day of his voluntary departure period, petitioner moved to reopen his removal proceedings to permit him to apply for discretionary adjustment of status based on a pending I-140, Immigrant Petition for Alien Worker.[1] Pet. App. 5a; A.R. 76. On July 30, 2003, the IJ denied petitioner's motion to reopen on the ground that petitioner's failure to effect voluntary departure within the voluntary departure period rendered him ineligible for adjustment of status. A.R. 35. Petitioner filed a motion to reconsider, which the IJ denied on October 20, 2003. Pet. App. 5a; A.R. 32.

Petitioner appealed the denial of his motion to reconsider to the BIA. On August 18, 2004, the BIA dis-

[1] Approval of the visa petition was a necessary precondition to petitioner's eligibility to adjust his status to that of lawful permanent resident under 8 U.S.C. 1255(a).

missed petitioner's appeal. Pet. App. 24a-26a. The BIA explained that petitioner's "filing of a motion to reopen on the last day of his voluntary departure period [did] not excuse his failure to depart [t]his country in accordance with the grant of voluntary departure." *Id.* at 26a (citing *In re Shaar*, 21 I. & N. Dec. 541 (B.I.A. 1996)). The BIA concluded that petitioner "knew that he had agreed to leave the United States on or before July 7, 2003," and that he "should have anticipated that the Immigration Judge would not likely be able to reach a decision on the very date the motion [to reopen] was filed." *Ibid.*

4. The court of appeals affirmed. Pet. App. 3a-20a.[2] The court rejected petitioner's contention that his filing of a motion to reopen had had the effect of tolling the running of his voluntary departure period. The court held that "the plain language of [8 U.S.C. 1229c(d)] and clear congressional intent expressly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits." *Id.* at 9a.

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[2] The government moved to remand petitioner's initial petition for review to the BIA for the limited purpose of determining whether petitioner had "received proper notice about the consequences of failing to depart voluntarily." Pet. App. 5a n.1. The court of appeals granted the government's motion. On remand, the BIA explained that petitioner had been personally served with the IJ's order and that the order set forth the voluntary departure deadline of July 7, 2003, and "set[] forth in detail the consequences of failure to depart within that time." *Id.* at 22a. The BIA thus determined that petitioner had "received adequate and proper written notice" of the consequences of failing to depart, *id.* at 22a-23a, and the BIA reiterated that petitioner's filing of a motion to reopen did "not extend the voluntary departure time," *id.* at 23a. Petitioner then filed a separate petition for review raising the same claims that had been raised in his initial petition. *Id.* at 6a n.1.

The court disagreed with the decisions of other courts of appeals holding that the filing of a motion to reopen tolls the voluntary departure period. That conclusion, the court explained, "ignores the well-established canon of statutory construction that 'a specific statutory provision controls a more general one.'" Pet. App. 11a (quoting *Warren* v. *North Carolina Dep't of Human Res.*, 65 F.3d 385, 390 (4th Cir. 1995)). In particular, the court reasoned, "the more specific voluntary departure provision governs in those limited situations in which it applies," whereas the more general provision entitling aliens to file one motion to reopen "applies to all aliens subject to removal." *Id.* at 11a-12a (citation omitted). The court concluded that its interpretation thus "gives effect to both provisions," in that a "motion to reopen remains available to all aliens, but an alien who requests voluntary departure will forfeit his right to a decision on his motion to reopen if the IJ grants his request." *Id.* at 13a. The court explained that "voluntary departure allows some aliens to make a deal with the government: they must give up certain rights," including the "right to a resolution of a motion to reopen," in "exchange for the benefits that flow from voluntary departure." *Ibid.*

The court further explained that adopting the contrary view "would have the effect of rendering the time limits for voluntary departure meaningless," because aliens granted voluntary departure "would have a strong incentive to file a motion to reopen in order to delay their departure." Pet. App. 14a. The court therefore held that "the statutory provisions governing motions to reopen and voluntary departure clearly indicate that filing a motion to reopen does not toll the voluntary departure period." *Id.* at 15a. Finally, the court noted

that, even if the statute were "silent or ambiguous" on the matter, the court "would have to defer to the BIA's interpretation of the statutes it administers." *Id.* at 16a.[3]

ARGUMENT

Petitioner contends (Pet. 6-19) that his filing of a motion to reopen had the effect of automatically tolling his voluntary departure period. The court of appeals correctly rejected that argument. Although that question has divided the courts of appeals, it does not warrant review in this case or at this time.[4]

1. The court of appeals correctly concluded that petitioner's filing of a motion to reopen did not automatically toll the running of the voluntary departure period. "Voluntary departure is a discretionary form of relief. If an alien chooses to seek it—and that choice is entirely up to the alien—it can produce a win-win situation." *Naeem* v. *Gonzales*, 469 F.3d 33, 36 (1st Cir. 2006). As the court of appeals explained, voluntary departure "allows some aliens to make a deal with the government: they must give up certain rights in exchange for the ben-

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[3] Judge Gregory concurred in the judgment. Pet. App. 18a-20a. He agreed with the court that petitioner "became ineligible for adjustment of status when he stayed beyond his departure period," but wrote separately to emphasize that the court "need not reach the question of whether tolling is an appropriate means of effectuating an alien's right to file a motion to reopen premised on a ground" concerning "other forms of relief" not specifically enumerated in 8 U.S.C. 1229c(d), "such as asylum or withholding of removal." Pet. App. 20a n.*.

[4] The same issue is raised in the second question presented by the petition for a writ of certiorari in *Moorani* v. *Gonzales*, petition for cert. pending, No. 06-610 (filed Oct. 31, 2006), and the second question presented by the petition for a writ of certiorari in *Dada* v. *Gonzales*, petition for cert. pending, No. 06-1181 (filed Feb. 26, 2007).

efits that flow from voluntary departure." Pet. App. 13a. A grant of voluntary departure enables an alien to avoid the five to ten-year period of inadmissibility that would result from an order of removal, see 8 U.S.C. 1182(a)(9)(A); to select the destination point; to make arrangements for departure without the threat of custody; and to avoid any stigma associated with forced removal. See, *e.g.*, *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006).

"The benefits normally associated with voluntary departure," however, "come with corollary responsibilities." *Naeem*, 469 F.3d at 37. Because a principal purpose of voluntary departure is to provide an incentive for aliens to effect a prompt departure, an alien who seeks voluntary departure at the close of removal proceedings must demonstrate the means and intent to depart the country within a brief time, see 8 U.S.C. 1229c(b)(1)(D); 8 C.F.R. 1240.26(c)(1)(iv) and (3). The Act accordingly prescribes that the voluntary departure period cannot exceed 60 days when voluntary departure is granted at the close of removal proceedings or 120 days when voluntary departure is granted before or during removal proceedings. 8 U.S.C. 1229c(a)(2)(A) and (b)(2). The statute further directs that, "[i]f an alien is permitted to depart voluntarily * * * and voluntarily fails to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive certain forms of discretionary relief including adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (as amended by Act of Jan. 5, 2006, Pub. L. No. 109-162, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

Contrary to petitioner's argument (Pet. 6-7), the INA's provision that an alien may file one motion to reopen, see 8 U.S.C. 1229a(c)(6)(A), does not establish that

the filing of such a motion automatically tolls the voluntary departure period. Petitioner contends (Pet. 6-7) that the BIA ordinarily will not have resolved a motion to reopen before the voluntary departure period expires, and that tolling is necessary to ensure that an alien has a meaningful opportunity to seek reopening. Petitioner thus argues that tolling is necessary in order to give effect to both the Act's provision for an alien to file a motion to reopen and its provision authorizing the Attorney General to permit voluntary departure. That argument is mistaken.

As the court of appeals explained, the "voluntary departure provision" establishing the maximum departure period of 60 or 120 days "applies to *certain* removable aliens" who qualify for that relief, "while the motion to reopen provision applies to *all* aliens subject to removal." Pet. App. 12a (emphasis added). Indeed, only 11% of removable aliens were granted voluntary departure in 2005. See *id.* at 12a n.5. Accordingly, "[f]ollowing the normal rule of statutory construction, the more specific voluntary departure provision governs in those limited situations in which it applies." *Id.* at 12a. Motions to reopen are unaffected in other cases.

Moreover, while the INA provides that an alien may file one motion to reopen, it confers no right to substantive relief. To the contrary, the granting of reopening is discretionary. See p. 4, *supra*. Similarly, the granting of voluntary departure is discretionary with the Attorney General, and the Attorney General is expressly authorized to limit eligibility for additional classes of aliens. See p. 3, *supra*. There accordingly is no inconsistency with the Act if, under applicable procedures, an alien who files a motion to reopen and chooses to remain in the country until the BIA acts upon it thereby gives up

the benefits of voluntary departure. See 8 U.S.C. 1229c(e).

The conclusion that the filing of a motion to reopen does not automatically stop the running of the voluntary departure period, or permit an alien to disregard his undertaking to depart within the time allowed, is strongly supported by this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995). There, the Court held that a final order of deportation remains final notwithstanding the filing of a motion to reopen, and that the time for filing a petition for judicial review of that order therefore is not tolled by the filing of a motion for reconsideration. See *id.* at 392-395. In reaching that conclusion, the Court pointed out that it was the longstanding position of the Attorney General, "a view we presume Congress understood when it amended the Act in 1990," that the filing of a motion for reconsideration (or reopening) does not serve to stay the deportation order. *Id.* at 398 (citing 8 C.F.R. 3.8 (1977)). Similarly, here, we must presume that Congress understood that rule when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the current regulations embody the same rule. See 8 C.F.R. 1003.2(f). Because a provision in a BIA decision allowing voluntary departure is simply an alternative to the formal removal order set forth in the same BIA decision—allowing the alien to depart on his own within a specified period of time rather than being subject to a formal order of removal and being removed by the government—it follows from that regulation that the voluntary departure re-

quirement of the decision is likewise not stayed or tolled by the filing of a motion to reopen.[5]

By contrast, "mandat[ing] tolling of the voluntary departure period when an alien files a motion to reopen would have the effect of rendering the time limits for voluntary departure meaningless." Pet. App. 14a; see *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387, 390 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007) ("Automatic tolling would effectively extend the validity of [an alien's] voluntary departure period well beyond the sixty days that Congress has authorized."). Accepting petitioner's tolling argument also would substantially deny the government the benefits of voluntary departure —*i.e.*, securing a prompt departure without the need to devote the resources that attend the process of issuing and executing an order of removal—without requiring petitioner to bear the associated costs. *Ibid.* As the court of appeals explained, "[i]f filing a motion to reopen automatically tolled the voluntary departure period, aliens who have been granted voluntary departure would have a strong incentive to file a motion to reopen in order to delay their departure." Pet. App. 14a; compare *Stone*, 514 U.S. at 400-401 (explaining that because a removal order remains final and subject to execution notwithstanding the filing of a motion for reconsideration, Congress has removed the incentive for aliens to file meritless motions). And "[b]ecause voluntary depar-

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[5] Indeed, the BIA held, prior to IIRIRA, that the filing of a motion to reopen did *not* toll the voluntary departure period. See *In re Shaar*, 21 I. & N. Dec. 541 (1996). Contrary to the Ninth Circuit's view in *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1286-1287 (2005), there is no indication that Congress intended to overturn that rule when it enacted IIRIRA, which, after all, imposed additional statutory restrictions on both voluntary departure and motions to reopen.

ture is a privilege that is only available to a subset of removable aliens, it is neither 'absurd' nor 'nonsensical' to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen." Pet. App. 13a.

The court of appeals thus correctly concluded that "both the plain language of the statute and clear congressional intent explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits" based on the filing of a motion to reopen. Pet. App. 9a. But even if the relevant statutory provisions are regarded as ambiguous on the matter, the agency's conclusion that the filing of a motion to reopen does not automatically toll the voluntary departure period under the existing statutory and regulatory scheme would be entitled to deference. See *id.* at 16a; *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The IJ's voluntary departure order in this case specifically informed petitioner that failure to depart within 120 days of the order would trigger the ten-year period of ineligibility for adjustment of status. See Pet. App. 22a; A.R. 36-37; see also 8 U.S.C. 1229c(d) ("The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."). Moreover, the governing regulations provide that an IJ or the BIA "may reinstate voluntary departure in a removal proceeding that has been reopened * * * *if reopening was granted prior to the expiration of the original period of voluntary departure*," and further provide that "[i]n no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in" the Act. 8 C.F.R. 1240.26(h) (emphasis added). The evident corollary is that, if reopening is *not* granted "prior to the expiration of the original period of voluntary departure,"

no reinstatement of voluntary departure or extension of the voluntary departure period is permissible. Petitioner filed his motion to reopen on the last day of the voluntary departure period, see p. 5, *supra*, and therefore was plainly on notice of the likelihood that the IJ would not act on his motion before the voluntary departure period expired.

2. As petitioner correctly explains, the courts of appeals are divided on whether the filing of a motion to reopen automatically tolls the voluntary departure period. Four courts of appeals have held that the filing of a motion to reopen automatically triggers such tolling. See *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006). Two courts of appeals (including the court below) have reached the contrary conclusion. See Pet. App. 3a-20a; *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007).

Although the courts of appeals are divided on the question, review is not warranted in this case or at this time. First, in light of the judicial decisions and issues that have been raised, the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case.[6] That rulemaking process will afford the Depart-

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[6] In 1997, when the Department, after notice and comment, promulgated interim regulations implementing the 1996 amendments to the INA, it discussed the tolling issue in the preamble, and stated that the issue would be addressed when final regulations were issued on a variety of subjects. See 62 Fed. Reg. 10,312, 10,326 (1997). No such comprehensive regulations have been issued. However, as stated in the

ment an opportunity to address the various statutory provisions bearing on reopening and voluntary departure, consider the various policy issues that have been raised, and further exercise the authority and discretion vested in the Attorney General under the relevant statutory provisions. Review of the tolling issue by this Court should await the issuance of such regulations.

Second, as the certiorari petition points out (Pet. 9-10), the Senate and the House of Representatives passed bills in the last Congress that contained provisions that would definitively resolve the tolling issue on a prospective basis in a manner consistent with the Fourth Circuit's decision in this case. See S. 2611, 109th Cong., 2d Sess. § 211(a)(3) (2006); H.R. 4437, 109th Cong., 2d Sess. § 208(b)(1) (2006). Comprehensive immigration reform is also under active consideration in the current Congress.[7] Thus, not only does the Department of Justice plan to address the issue by regulation, but there also is a prospect that Congress will do so.

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text, the Department has now determined that further regulations will be issued on the specific question of tolling presented in this case.

[7] In addition, we have been informed that the tolling issue has been raised in a number of cases pending before the BIA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2007